The City of New York

POLICE DEPARTMENT

March 23, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Lateef Payne
Tax Registry No. 930917
Bronx Court Section
Disciplinary Case No. 2010-3093

The above-named member of the Department appeared before me on October 17 and December 20, 2011, charged with the following:

1. Said Police Officer Lateef Payne, while assigned to Patrol Borough Bronx Task Force, while off-duty, on or about January 18, 2010, in the confines of Orange County, wrongfully engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Lateef Payne engaged in a physical and verbal altercation with his [redacted] Person APerson A [redacted]

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT PROHIBITED
CONDUCT - GENERAL REGULATIONS

2. Said Police Officer Lateef Payne, while assigned to Patrol Borough Bronx Task Force, while off-duty, on or about January 18, 2010, in the confines of Orange County, after being involved in an unusual police occurrence, failed and neglected to notify the Operations Unit, as required.

P.G. 212-32, Page 1, Paragraph 2 OFF DUTY INCIDENTS INVOLVING UNIFORMED MEMBERS OF THE SERVICE

3. Said Police Officer Lateef Payne, while assigned to Patrol Borough Bronx Task Force, while off-duty, on or about June 8, 2010, in the confines of Orange County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Lateef Payne stated in sum and substance to Person APerson A [redacted] I WILL THROW YOU OUT OF THE HOUSE AND KILL YOU, which caused Person APerson A [redacted] to fear for her physical safety.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT PROHIBITED CONDUCT

The Department was represented by Javier Seymore, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Lieutenant William Burnicke as its sole witness.

Lieutenant William Burnicke

Burnicke, a 21-year member of the Department currently assigned to the Bronx Investigations Unit, was assigned to investigate the Respondent on June 9, 2010, which was the date that the Department received notification that the Respondent was the subject of an order of protection with a firearms removal. That night, Burnicke conducted a tape-recorded telephone interview of the Respondent's [redacted] Person A Person A

Person A (Person A[1] Burnicke recalled that during the interview, Person A cried a little and sounded distraught.

Department's Exhibit (DX) 3 is the interview transcript. During the interview, Person A informed Burnicke that she and the Respondent had a child in common, and she also had a son named Minor B from a previous relationship. She stated that she sought the order of protection because the day before she and the Respondent got into an argument over the way that the Respondent was disciplining Minor B During the argument, the Respondent screamed and cursed at her, threatened her and Minor B and told her to get out of the house. Person A brought Minor B to a neighbor's house to spend the night.

Person A told Burnicke that the last time she had a physical altercation with the Respondent was during January, 2010. In that incident, the Respondent grabbed her with both hands and choked her. She considered calling the Respondent's union delegate but she did not follow through with the call because she was afraid of what the Respondent might do. She also considered calling the police but she did not do so because she could not bear to see the Respondent arrested. She did not sustain any injuries because the Respondent made sure not to leave any marks. The Respondent never pulled out or pointed a firearm at her, but he had tried to intimidate her by twice motioning that he was going to retrieve his firearm, which he kept on the window sill by the bed.

[DX 1 is the Orange County Family Court Family Offense Petition, signed by Person A It states that the Respondent had yelled and cursed at Person A and that he told her several times to get out of the house and that he would kill her before he left himself. Person A left the house because she feared that the Respondent would hurt her and the

[1] The Assistant Department Advocate (the Advocate) stated that although Person A was served with a subpoena to appear to testify at this trial, she was unwilling to testify in person.

children and possibly follow through with his threat to kill her. Person A noted in the petition that she did not file a criminal complaint concerning the incident because the Respondent is a police officer and he is good at making someone else look guilty. The petition also states that during January, 2010, the Respondent threatened her that he was going to reach for his gun after he had choked her and "smacked" her to the floor.]

[DX 2 is the Family Court Order of Protection, dated August 24, 2010. It orders the Respondent to stay away from Person A and Minor B. It also orders that he surrender all his firearms. The order will remain in force for a period of five years.]

On cross-examination, Burnicke confirmed that he has never met Person A in person, that Person A has not reported any further incidents between her and the Respondent, and that when Orange County law enforcement officers served the Respondent with the order of protection, he freely handed over his firearm to them. Burnicke's investigation commenced when the Respondent notified the Department about the order. The Respondent was never arrested based on allegations made by Person A. Person A told Burnicke that the Respondent never pointed his firearm at her or the children. Burnicke agreed that police officers are allowed to have arguments so long as threats are not made and physical violence does not occur. Burnicke confirmed that there is no record of police responding to any January, 2010 incident, and that at no time prior to June, 2010, did Person A allege that an incident had occurred during January, 2010. Burnicke confirmed that Person A continued to reside with the Respondent during the period after from January, 2010 to June, 2010. Burnicke agreed that the Respondent cooperated with Burnicke's investigation.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent, who is currently on modified duty assignment at the Bronx Court Section, confirmed that during January, 2010, he resided in Pinebush, New York with Person A their son, and Minor B who was about 12-years-old at the time. He recalled that he and Person A argued frequently. On June 8, 2010, they got into an argument over Minor B behavioral problems at school. Whenever they had argued previously, Person A would threaten to leave the house and he would ignore her threat. This time, when Person A threatened to leave, the Respondent told her to leave if that is what she wanted to do. When Person A told the Respondent that he should leave the house instead, the Respondent replied, "I am the bread winner, this is my house, and I am not going anywhere." Person A then told the Respondent that she was going to "make [him] eat those words."

At no point did the situation rise above the level of a verbal argument. Neither threats nor physical contact was made. The Respondent never told Person A that he would throw her out of the house and kill her. Person A had never called the police prior to that day, and to the Respondent's knowledge she did not call the police to the house on that day. The next day, three police officers came to the Respondent's residence, served him with an order of protection, and took his firearm. The Respondent immediately called the Operations Unit to notify them of the order of protection. Upon receiving

instruction to report to the 40 Precinct station house, the Respondent went straight there. He has not lived in his house since that day.

The Respondent testified that while it was possible that he had a verbal argument with Person A on or around January 18, 2010, he had no specific recollection of any argument taking place on that day. According to the Respondent, he and Person A have never had a physical altercation, nor did he ever threaten to harm Person A or the children. When asked why he did not call the Operations Unit, he explained, "Any arguments that we've ever had [have] just been arguments, they have not been to the point that [it was necessary] to call Operations or the police . . . nothing to rise to that level." The one time that he called the Operations Unit was because he was served with the order of protection. The order was returnable to Family Court. It is in effect for five years. The Respondent was never arrested based on any of the allegations that Person A made against him. There have not been any further incidents or altercations with Person A since June 8, 2010.

On cross-examination, the Respondent testified that he and Person A argued often toward the end of their [redacted] Most of the arguments were started by Person A as the Respondent is not the kind of person who likes arguing. Person A always accused the Respondent of being unfaithful. The Respondent reiterated that they never had any physical confrontations. He was, therefore, shocked to see the allegations in Person A Family Offense Petition (DX 1) since they were all untrue.

After Minor B got in trouble on a school bus on June 8, 2010, the Respondent spoke to him sternly. The argument with Person A began because she did not take Minor B disciplinary problems seriously. When the Respondent told her to leave if she wanted, he

was speaking nonchalantly. Person A left the house but came back later that night. She slept in Minor B room.

At the family court proceeding, the Respondent neither testified nor was he represented by an attorney. Although Person A testified under oath, she did not tell the truth. The judge ruled in Person A s favor, granting her an order of protection. The Respondent has not spoken with Person A since that day. They are presently in the final stages of [redacted]

Upon further questioning, the Respondent testified that June 9, 2010 was the first time that police had ever responded to his residence. Other than the service of the order of protection on that day, the Respondent was unaware that Person A had ever reported an incident to the police at any point during 2010.

FINDINGS AND ANALYSIS

Introduction

These charges assert that the Respondent engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, while he was off-duty, during two specific incidents alleged by Person A One that allegedly occurred on January 18, 2010 and the other on June 8, 2010.

The Advocate offered into evidence the Family Offense Petition (DX 1) that Person A filed in Family Court, Orange County, New York; and the Family Court Judge's post-hearing decision that "aggravating circumstances" existed which justified the issuance of an Order of Protection against the Respondent (DX 2).

Although Person A testified at the Family Court hearing, the subject matter and purpose of the Family Court hearing, the time period and breadth of the allegations alleged in the Family Offense Petition, and the evidence presented at the Family Court hearing, differ from the purpose of this disciplinary trial, the specific charges that are the subject of this disciplinary trial, and the evidence that was presented at this disciplinary trial.

In her Family Offense Petition, Person A alleged that the Respondent had been abusive to both her and her son Minor B "since 2008." (DX 1 page 3) Thus, the Family Court hearing involved far more alleged incidents than just the two alleged incidents in 2010 that are the subject of these charges, and the Family Court hearing also involved allegations that the Respondent had abused Minor B allegations which are not contained in the instant disciplinary charges.

That the Family Court Judge's post-hearing decision to issue an Order of Protection against the Respondent was based on incidents that are not charged in this disciplinary case is reflected by the Judge's reference to Person A "testimony of systematic verbal abuse by respondent to petitioner over their four year relationship;" her "testimony of sexual abuse where petitioner did not consent to the intercourse;" her testimony about a "sexually transmitted disease;" and her testimony that Respondent had verbally and physically abused Minor B (DX 2 page 2).

Thus, it is clear that the Family Court Judge's finding that "aggravating circumstances" existed which justified the issuance an Order of Protection against the Respondent was based on both more allegations and different substantive allegations than merely the two alleged incidents that are the subject of these charges.

Also, the evidence presented at the Family Court hearing differed from the evidence presented at this disciplinary trial. The statement that Person A made to Burnicke over the telephone (DX 3) contains, as discussed below, an admission by Person A that is inconsistent with her allegations against the Respondent. Since this statement was made by Person A after the Family Court hearing, the Family Court Judge was not aware of this admission by Person A

Finally, the purpose of the Family Court hearing differed from the purpose of this disciplinary trial. The Family Court hearing was conducted for the purpose of determining whether Person A request that an Order of Protection be issued against the Respondent should be granted. This disciplinary trial was conducted for the purpose of determining whether the Respondent violated the Patrol Guide by engaging in conduct prejudicial to the good order, efficiency or discipline of the Department on two occasions during 2010.[2]

Specification Nos. 1 and 2

It is charged that while the Respondent was off-duty on January 18, 2010, he engaged in conduct prejudicial to the good order, efficiency or discipline of the Department by engaging in a physical and verbal altercation with his [redacted] Person A inside the residence they shared and that he failed and neglected to notify the Operations Unit about this alleged altercation.

[2] See **Case No. 73435/98 (signed May 26, 1999)** where a sergeant was found Not Guilty of inflicting excessive corporal punishment on his son despite a Family Court finding of neglect against Respondent. In that case, the Trial Commissioner declined to apply the doctrine of collateral estoppel to the Family Court finding because the Family Court proceeding and the disciplinary hearing had different purposes. The Trial Commissioner further found that the hearsay allegations of the son and his siblings did not sufficiently establish the Respondent's guilt.

Since Person A ignored the subpoena that was served on her and refused to appear to testify at this trial, the only evidence that was presented by the Department to prove that the Respondent engaged in the charged altercation is the allegation Person A made in her Family Offense Petition (DX 1 page 4) and the statement that Person A made to Burnicke over the telephone (DX 3), which were both offered as hearsay evidence at this trial.

Regarding the quality of this latter hearsay evidence, although Burnicke testified that Person A cried a little and her voice sounded distraught, since this was not a face-to-face interview, Burnicke was not able to evaluate the believability of her story by examining Person A facial expressions, gestures and body language. Regarding the reliability of this hearsay evidence, the record establishes that Person A was angry at the Respondent because she believed that he was cheating on her with other women. Thus, Person A had a motive to want to make trouble for the Respondent.

As a result of Person A's willful failure to appear to testify at this trial, the Respondent's counsel did not have the opportunity to cross-examine her to test her story. I find this significant because Person A never called to request that police respond to the residence, because Person A was vague as to when this altercation supposedly took place, because she did not report the occurrence of this alleged altercation for over four months, and because she never demanded that the Respondent be arrested.

Although Person A claimed, in her statement to Burnicke and in her Family Offense Petition, that the Respondent had grabbed her around her neck with both of his hands, choked her, "smacked" her to the floor, and then threatened "that he was going to reach for his gun," which caused her to become "extremely afraid for her life" (DX 1

page 4), she was unable to recall the date during January, 2010, that the Respondent supposedly did this to her. If Person A had actually been "extremely afraid for her life," this incident would have been a highly memorable event. Thus, Person A should have been able to recall the specific date in January, 2010, when it took place. Also, the Respondent's counsel did not have the opportunity to cross-examine her as to why if she was "extremely afraid for her life" she remained in the residence living with the Respondent until June 9, 2010, why she did not report this incident to anyone for four months, and why she never demanded that the Respondent be arrested.

Based on the above, I find that Person A hearsay statements, standing alone, constitute insufficient credible evidence to support a finding that the Respondent engaged in any altercation with her on January 18, 2010. Since the Department did not prove that the Respondent engaged in an altercation on January 18, 2010, he is also found Not Guilty of having failed and neglected to notify the Operations Unit about the occurrence of an altercation.

The Respondent is found Not Guilty.

Specification No. 3

It is charged that the Respondent, while off-duty on June 8, 2010, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he told Person A in sum and substance, "I will throw you out of the house and kill you," and that this remark caused her to fear for her physical safety.

As with Specifications Nos. 1 and 2 above, the only evidence that was presented by the Department to prove this charge is the statement Person A made in her Family

Offense Petition (DX 1) and the statement that Person A Person A made to Burnicke over the telephone (DX 3), which were both offered as hearsay.

Person A Person A claimed in her Family Offense Petition that while she and the Respondent were arguing on June 8, 2010, he had threatened that "he would kill her before he would ever leave the house" (DX 1 page 2). However, in the statement Person A Person A made to Burnicke the day after this incident, when she was asked, "What happened yesterday?" although she vaguely asserted that the Respondent had threatened her, she did not state that he had specifically said that he would kill her. She merely stated that the Respondent had been screaming and cursing at her.

Moreover, although in her Family Offense Petition she alleged that she had taken both of her children with her "to her friend's house because she was afraid that Respondent would hurt them all, and possibly follow through with his threat to kill her (DX 1 page 2)," she admitted to Burnicke that three hours after she left the house, she returned to the house with her baby, that they slept there that night and that only her son stayed at her friend's house that night (DX 3 page 7). Because of her willful refusal to appear to testify, the Respondent's counsel did not have the opportunity to cross-examine her regarding why, only three hours after the Respondent had supposedly threatened to kill her, she returned to the house and remained in the Respondent's house that night.

The Respondent is found Not Guilty.

Respectfully submitted,

Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED
AUG 01 2012
RAYMOND W. KELLY
POLICE COMMISSIONER